



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Application of the Board of
Portage County Drainage District for a Permit to
Perform Dredging and Ditch Maintenance on
Various Drainage Ditches Within the Portage
County Drainage District

Case No.: 3-WC-99-4084CW
(formerly captioned
Case No. 3-WC-99-4170CW)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PERMIT

The Board of the Portage County Drainage District (Board) has applied for a permit under Wis. Stat. §30.20(2)(c) authorizing it to perform maintenance dredging and ditch maintenance on various drainage ditches within the Portage County Drainage District. The Board and the Wisconsin Department of Natural Resources (Department) entered into an agreement regarding dredging, ditch maintenance and dam operation within the Portage County Drainage District. On December 19, 2001, the Department requested that the Division of Hearings and Appeals hold a public hearing on the application for a dredging permit. Pursuant to due notice a hearing was conducted on February 19, 2002, in Stevens Point, Wisconsin, Mark J. Kaiser, Administrative Law Judge, presiding.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the parties to this proceeding are certified as follows:

Portage County Drainage District, applicant, by

Attorney J. Blair Ward
Assistant Corporation Counsel
County-City Building
1516 Church Street
Stevens Point, WI 54481

Wisconsin Department of Natural Resources, by

Attorney Edwina Kavanaugh
P. O. Box 7921
Madison, WI 53707-7921

FINDINGS OF FACT

1. The Portage County Drainage District (PCDD) maintains and operates a network of drainage ditches and dams in southeastern Portage County. The purpose of the District is to drain farmland and provide water for agricultural purposes. The network includes seven main drainage ditches and 55 dams. The ditches were dug during the period from 1909 to 1913 and the dams were constructed during the 1930s. The District was established by court order dated February 3, 1905. The court order also described the location, depth, width and side slopes for the drainage ditches to be constructed.

2. The Board of the PCDD (Board) has applied to the Wisconsin Department of Natural Resources (Department) for a 10-year permit under Wis. Stat. §§ 88.31 and 30.20(1)(b) and (2)(c) to perform dredging and ditch maintenance on various drainage ditches within the District. (Ex. 1) (The case number for an earlier Portage County Drainage District hearing was transposed in error onto the Department's request for hearing and the resulting notice of hearing issued by the Division of Hearing and Appeals. The correct case number assigned by the Department to this application is No. 3-WC-99-4084CW.)

3. The Board and the Department have entered into an Agreement pursuant to Wis. Stat. §§ 88.31, 30.20(1)(b) and (2)(c) and 31.02(6) to (7) and (8) to (9) regarding dredging, ditch maintenance and dam operation within the District. A copy of the Agreement is attached and incorporated herein by reference

4. Wis. Stat. § 88.31(4) requires the Department to grant a permit for the work proposed in the District that requires entering upon, removing obstructions from, cleaning out, widening, deepening, or straightening navigable waters if after hearing and investigation it finds:

- (a) That the public health and welfare will be promoted by the proposed removal of obstructions or by the straightening, cleaning out, deepening or widening of such navigable waters;
- (b) That the proposed work is necessary to the proper operation of the proposed drainage system; and
- (c) That the proposed work will not materially impair the navigability of any such waters and will not materially impair any other public right in or public uses of such waters. The enjoyment of natural scenic beauty is declared to be a public right to be considered along with other public rights.

5. The Department submitted a set of proposed conditions for the dredging permit. The Board is agreeable to having the proposed conditions imposed on the dredging permit, if such a permit is granted.

6. The Department and the Board have fulfilled all the procedural requirements of Wis. Stat. § 88.31 and notice of the hearing was given to all persons specified in Wis. Stat. § 88.05(4)(b).

7. The Department has complied with the procedural requirements of Wis. Stat. § 1.11 and ch. NR 150, Wis. Adm. Code, regarding assessment of the environmental impact. (Ex. 6)

8. The maintenance dredging and ditch maintenance authorized by the Agreement will be consistent with the public interest in the waters involved if conducted in accordance with the following permit.

9. The maintenance dredging and ditch maintenance authorized by the Agreement will reduce erosion in the ditches, which will improve the water quality in the system. For this reason the public health and welfare will be promoted by the activities authorized by the Agreement if conducted in accordance with the following permit.

10. The maintenance dredging and ditch maintenance authorized by the Agreement will not materially impair the navigability of the affected waterways and will not materially impair any public rights, including the public right to enjoy natural scenic beauty, in or public uses of the affected waterways if conducted in accordance with the following permit.

11. The maintenance dredging and ditch maintenance authorized by the Agreement will not adversely affect water quality nor increase water pollution as defined at Wis. Stat. § 299.01(4) if conducted in accordance with the following permit.

CONCLUSIONS OF LAW

1. The Board and the PCDD are a lawfully established drainage board and district under Wis. Stat. ch. 88.

2. Wis. Stat. § 30.20(1)(b) provides that no person may remove any material from the bed of any lake or stream without first obtaining a permit from the Department.

3. Wis. Stat. § 30.20 (2)(c) allows the Department to issue a permit to remove material from the bed of any lake or stream for a period of up to ten years if it finds that issuance will be consistent with the public interest in the water involved.

4. The proposed actions are type II actions pursuant to § NR 150.03(8)(f)1.a., Wis. Adm. Code. Pursuant to § NR 150.20(1)(c), Wis. Adm. Code, a type II action requires the issue identification, Environmental Assessment and decision procedures of the Environmental Impact Statement (“EIS”) process under Wis. Admin. Code §§ NR 150.21, 150.22 and 150.24, Wis. Adm. Code.

5. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 227.43(1)(b) and 88.31, and in accordance with the foregoing Findings of Fact, to grant the following permit to the Board subject to the conditions contained therein.

6. The maintenance dredging and ditch maintenance authorized by and conducted in compliance with the Agreement and this permit will meet the criteria under Wis. Stat. § 30.20 (1)(b) and (2)(c) for issuance of a permit under that provision.

7. The maintenance dredging and ditch maintenance authorized by and conducted in compliance with the Agreement and this permit will meet the criteria under Wis. Stat. § 88.31(4) for work in the District that requires entering upon, removing obstructions from, cleaning out, widening, deepening, or straightening any navigable waters.

PERMIT

AND HEREBY THERE DOES ISSUE AND IS GRANTED to the Board a 10-year permit to perform maintenance dredging as set forth in the Agreement executed by the Board and the Department and subject to the following conditions. Failure to comply with any of these conditions renders this permit null and void.

1. The Board shall obtain any authority required by local zoning ordinances and by the U.S. Army Corps of Engineers.

2. The Board shall waive any objection to the free and unlimited inspection of the premises, site, or facility at any time by any employee of the Department for the purpose of investigating the construction, operation, and maintenance of the project.

3. A copy of the permit and approved plan must be on site and available at all times during dredging.

4. The Board shall notify the Water Management Specialist within five days after a project is completed.

5. All equipment used for project activities below the ordinary high water mark shall be thoroughly power-washed before being brought on site to avoid introduction of exotic species from contaminated equipment.

6. Routine equipment inspections for fuel, hydraulic oil or lubricant leakage shall be conducted, and if any such problems occur, equipment shall be shut down immediately and the Department contacted.

7. Removal shall not exceed the dimensions specified in the work plans and drawings.

8. None of the removed materials shall be deposited upon any part of the bed of the ditch below the ordinary high water mark except as approved by the Department in circumstances where such fill may be required to maintain the integrity of the adjacent road, culvert, dam or ditch bank. No fill shall be placed in the hydraulic floodway of a stream except if project plans submitted to the Department include the location, quantity, height, length and material composition of such fill, and said project plans are specifically approved by the Department.

9. The project shall be completed in such a manner as to minimize upland soil losses and avoid sediment deposition into surface waters.

10. No spoil materials may be placed in any wetland.

11. The permittee, its agents and such other contractors as may be employed shall be jointly and severally liable for violations of Chapter 30 or this permit.

12. The authority herein granted can be amended or rescinded if the project becomes detrimental to the public interest.

13. Acceptance of this permit by the Board signifies its members have read, understand, and agree to follow all conditions of this permit.

Dated at Madison, Wisconsin on March 21, 2002.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By: _____
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.